

APPENDIX 4.10

School Impact Mitigation Agreement

SCHOOL IMPACT MITIGATION AGREEMENT

This School Impact Mitigation Agreement ("**Agreement**") is dated as of this 11th day of August, 2008 ("**Effective Date**") by and among the SANTA CLARA UNIFIED SCHOOL DISTRICT ("**District**"), a school district organized and existing under the laws of the State of California, and the party or parties signatory hereto, referred to as "**Developer**" with respect to the property described in Exhibit A. The District and Developer are referred to occasionally herein as a "**Party**" or "**Parties**."

RECITALS

A. This Agreement concerns real property within the District's boundaries (the "**District Boundaries**") as particularly described in Exhibit A located within of the County of Santa Clara ("**Property**"). Developer is the current legal owner and/or developer of the Property. Developer is developing and/or constructing residential units on the Property.

B. The District is considering the formation of a District-wide Mello-Roos Community Facilities District ("**CFD No. 1**") to fund school facilities required, in part, to accommodate students generated by development of the Property, all as more fully described in Resolution No. 08-24, adopted by the District Board of Education on July 24, 2008.

C. The Parties acknowledge that California law allows school districts, pursuant to the procedures and subject to the limitations established by state law, to impose fees on residential construction for the purpose of financing the acquisition and construction of school facilities to serve residential development within their boundaries. As of the Effective Date, the District has adopted and is collecting Level 1 mitigation fees pursuant to the Leroy F. Greene School Facilities Act of 1998 ("**School Facilities Act**") (1998 Statutes, Chapter 407), sections 17620, *et seq.*, of the Education Code and sections 65995, *et seq.*, of the Government Code, and may, in the future, increase or otherwise modify these fees. All such fees, charges or other exactions, as the same may be increased or modified, are hereinafter referred to as the "**Statutory Mitigation Fee**."

D. Developer acknowledges the risk posed for the District and future students of not having facilities when and as needed, and supports the District's ongoing efforts to ensure that it has adequate means to continue prudent fiscal and facilities planning and construction through a variety of sources, including development impact fees, special taxes, general obligation bonds, and similar sources of funding.

E. The District and Developer have agreed that it is in their mutual interests to cooperate and work together to implement, as an alternative to the District's current plans to call an election within CFD No. 1 and the current Statutory Mitigation Fee, a school mitigation program that includes payment of a flat fee of \$6,000.00 for each Residential Unit developed on the Property (the "**Agreed Mitigation Fee**") during Phase I of the City of San Jose North San Jose Development Plan (which includes up to 7,500 units in North San Jose and up to 3,000 units in Santa Clara/Sunnyvale) ("**Phase I**"). As used herein,

“Residential Unit” shall mean any single-family home or multi-family dwelling unit including, without limitation, condominiums, townhomes and apartment units, but shall not include “senior citizen housing,” within the meaning of Civil Code § 51.3, which shall be subject to the Statutory Mitigation Fee at the rate allowable under Government Code § 65595.1. The District and Developer desire, by this Agreement, to memorialize the terms for payment of the Agreed Mitigation Fee. The burdens and benefits of this Agreement will run with the land and burden and benefit subsequent owners of the Property, except as otherwise stated herein.

F. The Parties understand and agree that Developer’s participation and cooperation in implementing this Agreement shall constitute complete mitigation of any impact upon the District or its facilities from development of Residential Units during Phase I on the Property and will be in lieu of any Statutory Mitigation Fee, CFD No. 1 special tax, or any other tax, assessment, fee, charge, dedication or other requirement which the District might have imposed, or could in the future impose, upon the Developer in connection with development of the Residential Units on the Property, whether pursuant to the Mello-Roos Act, the Education Code, the Government Code or any other existing or future legislation, ordinance, resolution or other law or court decision (collectively, ***“School Mitigation Requirements”***).

NOW THEREFORE, in consideration of the promises, covenants and provisions set forth herein, the District and the Developer agree as follows:

ARTICLE 1

AGREED MITIGATION FEES

1.1 Developer’s Obligation. In lieu of payment of Mello-Roos special taxes, the Statutory Mitigation Fee and/or any other School Mitigation Requirements, Developer shall pay to District the Agreed Mitigation Fee for each Residential Unit developed on the Property as part of Phase I. The Agreed Mitigation Fee for each such Residential Unit shall be due and payable prior to the issuance of a building permit for that unit, but may be paid at any time prior to such date in the sole discretion of the Developer.

1.2 Certificate of Compliance. Upon tender of the Agreed Mitigation Fee by the Developer, the District shall issue to the Developer a certificate of compliance evidencing that, with respect to the Residential Unit (and associated Property) for which the Agreed Mitigation Fee has been paid (which shall be identified by unit, lot number or other appropriate description), the Developer has complied with any and all School Mitigation Requirements of the District. Payment of the Agreed Mitigation Fee shall be in the form of a cashier’s check or electronic transfer at the District’s discretion and instruction.

1.3 Administrative Payment. Developer agrees, in addition to payment of the Agreed Mitigation Fee, to pay to the District or its designee, within 90 days of the Effective Date, \$10,000.00 to cover administrative costs related to the negotiation and implementation of this Agreement.

1.4 Expenditure of Agreed Mitigation Fees. The Agreement Mitigation Fee shall be used to meet facilities or operational needs determined by the District in its sole discretion.

1.5 No Reduction or Credit. Developer's obligation to pay the Agreed Mitigation Fee shall be absolute as to all Residential Units developed in Phase 1. Developers acknowledge that in the event that the District receives funds from the State of California or any other source to house existing or projected students generated from the Residential Units, Developers or their successors or assigns shall not be entitled to any refund or credit or reduction in Agreed Mitigation Fees as a result of the receipt of such State or other funds.

ARTICLE 2

FULL MITIGATION; SUCESSORS AND ASSIGNS

2.1 Sole and Exclusive Mitigation. With regard to the development of Residential Units during Phase I, the Agreed Mitigation Fee shall be the sole and exclusive school mitigation payable in connection with development of Residential Units on the Property regardless of any future change in law, rule, regulation, or policy and shall be in lieu of any and all other School Mitigation Requirements whatsoever due, payable, or sought by District currently or in the future relating in any manner to school impacts or school facilities. Nothing in this Agreement (including, without limitation, Section 2.2, below), shall be interpreted to prohibit or limit the District's options for the funding or financing of school facilities needs with respect to the development of Residential Units after completion of Phase I. The District shall not be prohibited from or limited in levying any general obligation tax or other exaction on the Properties (subject to applicable law) once development of the Properties has occurred and the Residential Units have been sold to future home buyers, provided such tax or other exaction is uniformly imposed on all similar property within the District. Developer shall not in any manner impede or prevent the levy and collection of the special taxes and the issuance of CFD No. 1 bonds or the issuance of general obligation bonds or other exactions on properties other than the Property so long as such actions are consistent with the terms of this Agreement.

2.2 District's Covenants. District covenants and agrees that, with respect to development of Residential Units on the Property in Phase I, it shall not oppose or support opposition to such development or assist or engage in any of the following actions if the reasonably foreseeable result of any of them, directly or indirectly, would be to require payment of any exaction or imposition of any mitigation measures on the Property other than or in excess of the Agreed Mitigation Fee:

(a) exercise any power or authority to levy a fee, charge, dedication, special tax, or other form of requirement against the Property for the purpose of funding or financing any school facilities in connection with development of Residential Units;

(b) require any other governmental entity to exercise, or cooperate with any governmental entity in the exercise of the power under Title 7, Division 1, Chapter 4.7 of the Government Code (commencing with Section 65970) or any other law, to require the dedication of land, the payment of fees in lieu thereof, and/or the payment of special taxes for interim or permanent school facilities as a condition to the approval of development of the Residential Units;

(c) seek to condition development of Residential Units on the basis of inadequate school facilities or seek other forms of mitigation with respect to the adequacy of school facilities to serve the Residential Units, including, but not limited to, the establishment of developer fees, the payment of special taxes, the payment of money, the dedication of land, or the application of an assessment or requirement of any nature against the Property or any portion thereof permitted by present or future state law, rulings, regulations, and court decisions; and

(d) suggest, request, initiate, or support litigation to require School Mitigation Requirements in connection with development of the Residential Units.

2.3 Running Covenant. Subject to the limitations set forth herein, the covenants of this Agreement shall run with the land and shall bind and inure to the benefit of the successors and assigns of the Parties. Developer agrees for the benefit of District that the Property described in Exhibit A hereto, shall be held, transferred, and encumbered subject to the provisions of this Agreement which are for the use and benefit of it and of each and every person who now or in the future develops the Property as part of Phase I. The Property shall be thus held, transferred, and encumbered only so long as, and only to the extent to which, the Property is developed for Residential Units.

2.4 Memorandum of Agreement. Within thirty days following the full execution and approval of this Agreement, Developer shall execute or cause to be executed and provide to District a fully executed and notarized memorandum of agreement in the form attached as Exhibit B, which shall be recorded against the Property.

2.5 Satisfactory Performance. Payment of the Agreed Mitigation Fee as to all or part of the Property shall extinguish the burden of this covenant on such Property or part of the Property ("**Released Property**") and shall release the Developer from the obligations of this Agreement as to the Released Property. Upon such payment, with respect to the Released Property, this Agreement shall be terminated and of no further force or effect and shall not be a matter of record; provided, however, that the agreements, covenants and obligations of the Parties in Sections 2.1 and 2.2 shall survive such termination and shall remain in full force and effect with respect to the Released Property. The District and Developer hereby authorize and direct that any and all policies of title insurance with respect to the Released Property shall not include or describe the Agreement in matters affecting the condition of title to the Released Property, or applicable portion(s) thereof, following the payment of the Agreed Mitigation Fee.

2.6 Transfer Rights. Nothing in this Agreement shall in any way limit the ability of Developer to transfer, sell, assign, encumber or in any way convey (collectively a

"**Transfer**") any interest in the Property without the consent of District, provided Developer provides written notice of such Transfer and the transferee ("**Transferee**") assumes the obligations of Developer under this Agreement in writing. Upon the Transferee's written assumption of the obligations under this Agreement and the closing of the Transfer, the transferring developer shall be released from all obligations under this Agreement and District shall look solely to the Transferee for performance of the obligations hereunder pertaining to the transferred Property.

2.7 Home Buyers. This Agreement shall not apply to any agreement between Developer and a member of the home-buying public pursuant to which such home buyer has agreed to purchase a single Residential Unit upon or after construction of such Residential Unit, or any subsequent sale of such Residential Unit after such home buyer acquires title to the Residential Unit, nor shall the Developer be required to provide such prospective home buyers any notices or disclosures otherwise required under this Agreement other than those notices or disclosures independently required by State law.

ARTICLE 3

MISCELLANEOUS

3.1 Recitals. The recitals above are true and correct, and are incorporated into this Agreement by this reference.

3.2 Exhibits. The following exhibits are attached hereto and incorporated into this Agreement by this reference:

3.2.1 Exhibit A: "Legal Description of Property."

3.2.2 Exhibit B: "Form of Memorandum of Agreement."

3.3 Governing Law. This Agreement shall be construed in accordance with, and governed by, the laws of the State of California applicable to contracts to be performed wholly within the State.

3.4 Construction. The singular includes the plural, "shall" is mandatory, and "may" is permissive. The Parties acknowledge and agree that each of the Parties and each of the Parties' attorneys have participated fully in the negotiation and drafting of this Agreement. In cases of uncertainty as to the meaning, intent or interpretation of any provision of this Agreement, the Agreement shall be construed without regard to which of the Parties caused, or may have caused, the uncertainty to exist. No presumption shall arise from the fact that particular provisions were or may have been drafted by a specific party, and prior versions or drafts of this Agreement shall not be used to interpret the meaning or intent of this Agreement or any provision hereof.

3.5 Notices. Any notice to be given hereunder to either Party shall be in writing and shall be given either by personal delivery (including express or courier service), or by registered or certified mail, with return receipt requested, postage prepaid (excluding electronic messaging) and addressed as follows:

To District:

Santa Clara Unified School District
Superintendent
1889 Lawrence Road
Santa Clara, California 95051

To Developer:

To the address for Developer, which shall be provided at the time of
submittal of the Memorandum pursuant to Section 2.4.

3.6 Time is of the Essence. Time is of the essence in the performance of each
Party's respective obligations under this Agreement.

3.7 Amendments/Waivers. No amendment of, supplement to or waiver of any
obligations under this Agreement will be enforceable or admissible unless set forth in
writing signed by the Party against which enforcement or admission is sought. No delay or
failure to require performance of any provision of this Agreement shall constitute a waiver
of that provision as to that or any other instance. Any waiver granted shall apply solely to
the specific instance expressly stated.

3.8 Entire Agreement. This Agreement sets forth the entire understanding of
the Parties relating to the transactions it contemplates, and supersedes all prior
understandings relating to them, whether written or oral.


3.9 Execution in Counterparts. This Agreement may be executed in multiple
counterparts, each of which shall be deemed an original, and counterpart signature pages
may be assembled to form a single original document. Signatures transmitted via fax shall
be accepted as originals. Consolidated signature pages shall be compiled by the District
and forwarded to the Developer to constitute the Developer's executed copy of the
Agreement.

3.10 Signatures. By signing below, each of the signatories represents and
warrants that he or she has been duly authorized to execute this Agreement on behalf of the
Party on whose behalf he or she is signing. The President of the District Board of
Education further represents and warrants, by his signature, that this Agreement has been
duly ratified and approved by the Board of Education of the District.

IN WITNESS WHEREOF, this Agreement has been entered into by and between
the District and Developer effective as of the date first written above.

"DISTRICT"

SANTA CLARA UNIFIED SCHOOL
DISTRICT

By: 
President, Board of Education
Sgt.

Dated: August 22, 2008

Approved as to legal form:

Attorney for Santa Clara Unified School
District

Dated: August ___, 2008

“DEVELOPER”

[PRII KIELY BOULEVARD LLC<
A Delaware limited liability company

By: FF Kiely Boulevard LLC,
A Delaware limited liability company,

By: FF Properties, Inc.,
A Delaware corporation,
Its Manager]

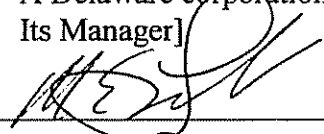
By: 
Its: Vice-President

Exhibit "A"

Legal Description

Real property in the City of Santa Clara, County of Santa Clara, State of California, described as follows:

PARCEL ONE :

BEGINNING AT A POINT ON THE WESTERLY LINE OF THAT CERTAIN 45 FOOT STRIP OF LAND CONVEYED BY WILLIAM H. CILKER, ET UX TO CITY OF SANTA CLARA, A MUNICIPAL CORPORATION BY DEED DATED APRIL 25, 1961 AND RECORDED APRIL 28, 1961 IN BOOK 5150 OF OFFICIAL RECORDS AT PAGE 670, SANTA CLARA COUNTY RECORDS, DISTANT THEREON S. 0° 19' 30" E. 670.00 FEET FROM THE INTERSECTION OF SAID WESTERLY LINE OF SAID STRIP OF LAND WITH THE NORTHERLY LINE OF THAT CERTAIN TRACT OF LAND CONVEYED BY RUTH PIERCE RANEY, ET AL TO WILLIAM H. CILKER, ET UX, BY DEED DATED AUGUST 15, 1950 AND RECORDED SEPTEMBER 14, 1950 IN BOOK 2053 OF OFFICIAL RECORDS AT PAGE 495, SANTA CLARA COUNTY RECORDS; THENCE FROM SAID POINT OF BEGINNING ALONG THE WESTERLY LINE OF SAID 45 FOOT STRIP OF LAND S. 0° 19' 30" E. 471.27 FEET TO THE BEGINNING OF A CURVE; THENCE SOUTHERLY CONTINUING ALONG THE WESTERLY LINE OF SAID 45 FOOT STRIP OF LAND, ALONG THE ARC OF A CURVE TO THE LEFT HAVING A RADIUS OF 1245 FEET TANGENT TO THE PRECEEDING COURSE, THROUGH AN ANGLE OF 12° 56' 19", AN ARC DISTANCE OF 281.15 FEET TO THE SOUTHERLY CORNER OF SAID 45 FOOT STRIP OF LAND IN THE SOUTHEASTERLY BOUNDARY OF SAID TRACT OF LAND CONVEYED TO WILLIAM H. CILKER ABOVE REFERRED TO; THENCE ALONG THE SOUTHEASTERLY BOUNDARY OF SAID TRACT OF LAND CONVEYED TO WILLIAM H. CILKER, ET UX, S. 44° 06' 40" W. 192.55 FEET TO THE NORTHEASTERLY LINE OF THAT CERTAIN PARCEL OF LAND CONVEYED BY WILLIAM H. CILKER, ET UX, TO CITY OF SANTA CLARA, A MUNICIPAL CORPORATION, BY DEED DATED APRIL 25, 1961 AND RECORDED APRIL 28, 1961 IN BOOK 5150 OF OFFICIAL RECORDS AT PAGE 674, SANTA CLARA COUNTY RECORDS, AND BEING PARCEL NO. 2 DESCRIBED IN SAID DEED; THENCE ALONG THE NORTHEASTERLY LINE OF SAID LAST MENTIONED PARCEL OF LAND N. 18° 33' 06" W. 52.47 FEET TO THE NORTHERLY CORNER THEREOF; THENCE ALONG THE NORTHWESTERLY LINES OF SAID LAST MENTIONED PARCEL OF LAND SOUTHWESTERLY ALONG THE ARC OF A CURVE TO THE RIGHT HAVING A RADIUS OF 500 FEET, FROM A TANGENT BEARING S. 48° 04' 40" W., THROUGH AN ANGLE OF 22° 56' 31", AN ARC DISTANCE OF 200.21 FEET TO A POINT OF REVERSE CURVE; THENCE CONTINUING ALONG THE NORTHWESTERLY LINE OF SAID LAST MENTIONED PARCEL OF LAND CONVEYED TO CITY OF SANTA CLARA, A MUNICIPAL CORPORATION, SOUTHWESTERLY ALONG THE ARC OF SAID REVERSE CURVE TO THE LEFT, HAVING A RADIUS OF 497 FEET, THROUGH AN ANGLE OF 13° 18' 57", AN ARC DISTANCE OF 115.51 FEET TO THE WESTERLY CORNER OF SAID LAST MENTIONED PARCEL OF LAND IN THE SOUTHWESTERLY BOUNDARY OF SAID TRACT OF LAND CONVEYED TO WILLIAM H. CILKER, ET UX, ABOVE REFERRED TO; THENCE ALONG THE SOUTHWESTERLY BOUNDARY OF SAID TRACT OF LAND CONVEYED TO WILLIAM H. CILKER, ET UX, N. 27° 35' 34" W. 66.34 FEET TO AN ANGLE THEREIN; THENCE CONTINUING ALONG THE SOUTHWESTERLY BOUNDARY OF SAID TRACT OF LAND CONVEYED TO WILLIAM H. CILKER, ET UX, N. 69° 19' 27" W. (TO AND ALONG THE NORTHEASTERLY BOUNDARY OF TRACT NO. 1589 PEPPER TREE PLACE THE MAP OF WHICH IS ON FILE IN BOOK 63 OF MAPS AT PAGES 18, 19 AND 20, SANTA CLARA COUNTY RECORDS) 641.41 FEET; THENCE LEAVING THE SOUTHWESTERLY BOUNDARY OF SAID TRACT OF LAND CONVEYED TO WILLIAM H. CILKER, ET UX, N. 0° 19' 30" W. 701.46 FEET TO A POINT WHICH BEARS S. 89° 52' 18" W. AND PARALLEL WITH THE NORTHERLY LINE OF SAID TRACT OF LAND CONVEYED TO WILLIAM H. CILKER, ET UX, FROM THE POINT OF BEGINNING; THENCE PARALLEL WITH THE NORTHERLY LINE OF SAID TRACT OF LAND CONVEYED TO WILLIAM H. CILKER, ET UX, N. 89° 52' 18" E. 1025.00 FEET TO THE POINT OF BEGINNING, AND BEING A PORTION OF SAID TRACT OF LAND CONVEYED TO WILLIAM H. CILKER, ET UX, AND BEING A PART OF SECTION 9, TOWNSHIP 7 SOUTH, RANGE 1 WEST MOUNT DIABLO BASE AND MERIDIAN AND A PART OF THE QUITO RANCHO.

EXCEPTING THEREFROM THAT PORTION GRANTED TO THE COUNTY OF SANTA CLARA BY DEED RECORDED JULY 8, 1962 AS INSTRUMENT NO. 2221948, BOOK 5638, PAGE 5, SANTA CLARA COUNTY OFFICIAL RECORDS AND THENCE DEEDED TO SANTA CLARA COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT BY DEED RECORDED DECEMBER 5, 1962 AS INSTRUMENT NO. 2306619, BOOK 5817, PAGE 543, SANTA CLARA COUNTY OFFICIAL RECORDS.

PARCEL TWO:

ALL THAT CERTAIN REAL PROPERTY SITUATE IN THE CITY OF SANTA CLARA, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, BEING A PORTION OF SECTION 9, TOWNSHIP 7 SOUTH, RANGE 1 WEST, M.D.B. & M. AND ALSO BEING A PORTION OF PARCEL "A" AS SHOWN ON THAT CERTAIN RECORD OF SURVEY FILED IN BOOK 239 OF MAPS AT PAGE 41, SANTA CLARA COUNTY RECORDS, DESCRIBED AS FOLLOWS:

BEGINNING AT THE WESTERLY TERMINUS OF THE SOUTHERLY LINE OF KAISER DRIVE, 60 FEET WIDE, AS GRANTED TO THE CITY OF SANTA CLARA BY DEED, RECORDED IN BOOK 7458, OFFICIAL RECORDS, PAGE 364, SANTA CLARA COUNTY RECORDS; THENCE ALONG THE WESTERLY LINE OF THE PARCEL OF LAND CONVEYED TO KAISER FOUNDATION HOSPITALS, BY DEED, RECORDED IN BOOK 5405, OFFICIAL RECORDS, PAGE 39, SANTA CLARA COUNTY RECORDS; S. $00^{\circ} 19' 30''$ E. 641.46 FEET TO THE SOUTHWESTERLY CORNER THEREOF ON THE NORTHERLY LINE OF TRACT NO. 1589, PEPPER TREE PLACE, RECORDED IN BOOK 63 OF MAPS AT PAGES 18, 19 AND 20, SANTA CLARA COUNTY RECORDS; THENCE ALONG SAID NORTHERLY LINE N. $69^{\circ} 19' 27''$ W. 437.26 FEET TO A POINT ON A LINE THAT IS PARALLEL WITH AND 30.00 FEET EASTERLY OF MEASURED AT RIGHT ANGLES FROM THE CENTERLINE OF PEPPER TREE LANE, AS SAID CENTERLINE IS SHOWN ON SAID TRACT NO. 1589; THENCE NORTHERLY ALONG A LINE THAT IS PARALLEL WITH AND 30.00 FEET EASTERLY OF MEASURED AT RIGHT ANGLES FROM THE EASTERLY LINE AND THE SOUTHERLY EXTENSION THEREOF OF THAT CERTAIN 30.00 FOOT STRIP OF LAND DEDICATED TO THE CITY OF SANTA CLARA AS EXHIBIT "B" IN THE DEED RECORDED IN BOOK 6543, OFFICIAL RECORDS, PAGE 142, SANTA CLARA COUNTY RECORDS, N. $00^{\circ} 25' 10''$ W. 75.23 FEET; THENCE ON A TANGENT CURVE TO THE RIGHT HAVING A RADIUS OF 470.00 FEET THROUGH A CENTRAL ANGLE OF $12^{\circ} 51' 27''$ FOR AN ARC LENGTH OF 105.47 FEET; THENCE N. $12^{\circ} 26' 17''$ E. 297.76 FEET; THENCE ON A TANGENT CURVE TO THE RIGHT HAVING A RADIUS OF 20.00 FEET THROUGH A CENTRAL ANGLE OF $77^{\circ} 26' 01''$ FOR AN ARC LENGTH OF 27.03 FEET TO A POINT ON THE WESTERLY EXTENSION OF THE SAID SOUTHERLY LINE OF KAISER DRIVE; THENCE ALONG SAID WESTERLY EXTENSION N. $89^{\circ} 52' 18''$ E. 311.37 FEET TO THE POINT OF BEGINNING.

PARCEL THREE:

PARCEL B, AS SHOWN ON PARCEL MAP FILED, MAY 20, 1970 IN BOOK 268 OF MAPS, AT PAGE(S) 20, SANTA CLARA COUNTY RECORDS.

APN: 290-26-022 (Affects: Parcel Three) and 290-26-024 (Affects: Parcels One and Two)